SUPREME COURT, U.S.
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No.

IN THE

Supreme Court of the United States

ESTANISLAO S. MAPOY,

Petitioner,

v.

WILLIAM CARROLL, District Director,
United States Department of Justice
Immigration and Naturalization Service,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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50pp

QUESTION PRESENTED

Whether, Section 242 (g) of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 divest the district court of jurisdiction to hear petition for a writ of habeas corpus and request for declaratory and injunctive relief to a petitioner who is in an imminent danger of being removed from the United States while his Motion to Reopen predicated on new facts is pending before the Board of Immigration Appeals and where no other relief is available , and where petitioner presented affirmative and equitable factors favoring a stay of deportation including the presence of a child who is a United States Citizen and a wife who recently took her oath as a United States Citizen and was a permanent resident alien then during the proceedings and where likelihood of extreme hardship can be shown to said immediate relatives for purposes of availing the relief of Suspension of Deportation under section 244 (a)(l) of the Act, 8 U.S.C. 1254 (a) (l).

Whether Petitioner's Motion to Reopen filed before the Board of Immigration Appeals on October 16, 1997 and within the ninety days of the Ninth Circuit's decision of July 25, 1997 is timely under 8 C.F.R. 3.2(c)(2) which requires that a motion to reopen be filed within ninety days after the administrative decision became final or on or before September 30, 1996 whichever is later.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Estanislao S. Mapoy ("petitioner" hereafter) prays that this Court review on certiorari the judgment of the United States Court of Appeals, for the Fourth Circuit, which vacated and reversed with published opinion the decision of the United States District Court for the Eastern District of Virginia, at Alexandria entered against William Carroll, District Director, United States Department of Justice Immigration and Naturalization ("respondent" hereafter).

DECISION BELOW

The published opinion vacating and remanding the case to the United States District Court for the Eastern District of Virginia, at Alexandria is set out in the Appendix, at la-11a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit, reversed and remand with published opinion on July 13, 1999 and on September 8, 1999 denied rehearing, or rehearing en banc. Appendix 2a. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (l).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Article I, 9, cl. 2

* * *

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public safety requires it.

U.S. Const. Amend. V

* * *

No person shall be deprived of life,liberty or property without due process of law.

STATUTE INVOLVED

28 U.S.C. 2241

Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit courts within their respective jurisdictions.

8 U.S.C. 1252 (g) as amended by IIRIRA 306 (a)

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to

commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

STATEMENT OF THE CASE

Petitioner filed a Complaint against respondent on November 14, 1997 for Declaratory and Injunctive Relief and Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Virginia seeking a stay of deportation and release from detention based upon Petitioner's imminent deportation as a result of the Board of Immigration Appeal's denial of the emergency request of stay deportation. Petitioner at the time of the filing of the complaint for declaratory relief and injunctive relief and petition for writ of habeas corpus has a pending Motion to Reopen to reapply for the relief of Suspension of Deportation under Section 244(a) of the Immigration and Nationality Act predicated on new facts to be proved upon reopening which are material, relevant and were unavailable during his deportation hearing. Petitioner has now a permanent resident alien spouse and a U.S citizen child , his qualifying relatives for the purpose of showing the element of extreme hardship under section 244(a) of the Act. Petitioner's request for stay of Deportation from the Immigration and Naturalization Service was denied and a request for emergency stay was also denied by the Board of Immigration Appeals. Petitioner is facing imminent deportation while his Motion to Reopen and Reconsideration is pending before the Board of Immigration Appeals. Petitioner alleged irreparable harm to his immediate family members i.e wife who is a permanent resident of the United States and a U.S citizen child if he would be deported from the United States while his Motion to Reopen is pending before the Board of Immigration Appeals.

Petitioner alleged that he is a native and citizen of the Philippines who since his lawful entry in the United States on a B-2 tourist visa on September 3, 1985 has remained in the United States for over thirteen years. He voluntary placed himself in deportation proceedings with the Order to Show

Cause issued against him on June 12, 1993, and he applied for suspension of deportation pursuant to 244(a)(l) of the INA. Petitioner's application for Suspension of Deportation was denied by the Immigration Judge on February 1, 1994. The Board of Immigration Appeals denied the appeal on March 8, 1996 . The Ninth Circuit denied the petition for review on July 25, 1997 in an order issued on August 5, 1997. Petitioner was ordered to report for deportation on or around November 14, 1997. Petitioner filed a Motion to Reopen his deportation proceedings and for Stay of Deportation on October 16, 1997 with the Board of Immigration Appeals based on new circumstances which were not present during his initial deportation proceedings where he applied for suspension of deportation in 1993 i.e. marriage to a legal permanent resident and at this time has become a U.S Citizen by naturalization and having a U.S Citizen child who was born on October 30, 1997. Petitioner also has an approved I-130 immigrant visa petition and by virtue of the wife becoming a U.S. citizen can now file an application for adjustment of status based on the approved petition.

On November 26, 1997, the United States District Court issued a Memorandum of Opinion and Order finding among others that it has subject matter jurisdiction on the habeas corpus petition and that Petitioner's Motion to Reopen pending before the Board of Immigration and Naturalization Service was timely filed. The Immigration and Naturalization Service was enjoined from deporting Mapoy until the Board of Immigration Appeals had considered the Motion to Reopen. Petitioner was then released on bond but continue to be on house arrest while his case is pending. Petitioner is at present allowed to work with the Immigration and Naturalization Service issuing the work authorization while his case is pending. The District Court's exercise of subject matter jurisdiction on the complaint and habeas petition includes a finding that Petitioner's detention pending a resolution of his motion to reopen was arbitrary, capricious

and an abuse of discretion, in violation of U.S.C. 706 (2)(A). Appendix 3a.

The United States Court of Appeals for the Fourth Circuit after hearing the oral arguments of the parties and based on the pleading submitted rendered a published opinion on July 13, 1999 vacating the district court's decision and remand with the instruction to dismiss Petitioner's complaint and habeas petition for want of subject matter jurisdiction. Petitioner's Request for Rehearing was denied on September 8, 1999.

Petitioner's claims of constitutional deprivation under the Fifth Amendment and under 28 U.S.C. 2241 were alleged in most pertinent part as follows:

11. Petitioner is facing imminent deportation as a result of the Board of Immigration Appeal's denial of the emergency request to stay deportation.

12. If the Petitioner is deported prior to a decision of the Board of Immigration Appeals on the Motion to Reopen and Reconsider, his motion becomes moot and he would never be able to raise any of the legal issues presented to the Board of Immigration Appeals nor could he obtain a hearing or other adjudication on the merits of his claim.

13. Petitioner is being subjected to an unlawful, arbitrary, and unconstitutional restraint of his liberty and is denied due process by being held for deportation, being denied the opportunity to present his claims based on new set of facts i.e. that having two qualifying relatives, a lawful permanent resident spouse (now a United States Citizen and a U.S Citizen child). That if given the opportunity to present his claim, petitioner can prove the statutory requirement of extreme hardship under the Suspension of Deportation relief threshold.

14. No petition for habeas corpus or any other form of judicial review has previously been filed in any court to review the decision and actions described in this petition.

15. There is no administrative appeal from the denial of a Stay of Deportation by the Immigration and Naturalization Service.

16. If the Petitioner were to be deported from the United States, not only he, but his immediate family members would suffer irreparable harm and he most likely would be separated from his family for a long time. He would be forever barred from the bonding with his newborn child which is so important in the first month's of a child's life. His motion would be deemed abandoned and his claim moot, and he would never be able to obtain adjudication of any of the legal claims now pending.

Respondent answered and filed his opposition on October 31, 1997 to the Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeas Corpus with Stay of Deportation and alleged among others: The District Court lacks subject matter jurisdiction to review the decision to execute the removal order against the petitioner under section 242(g) of the INA which according to the respondent divested the district court of jurisdiction expressly precluding the District Courts from considering such claims:

> (g) EXCLUSIVE JURISDICTION: Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien.

That in the unlikely event that this Court concludes it has jurisdiction to stay petitioner's deportation, the court should nevertheless decline to do so. First, it is highly unlikely that respondent will prevail on his motion to reopen because he is not eligible for relief from deportation he seeks. Furthermore, he will not suffer irreparable harm if he is deported. Finally,

the INS will suffer undue prejudice if its restrained from carrying out he final order of deportation against respondent.

Petitioner in its memorandum and rejoinder and in reply to the opposition to the Motion for Injunctive Relief and Petition for Writ of Habeas Corpus contends that the United States District Court has jurisdiction over the subject matter under its power of judicial review to protect Petitioner's rights under the due process clause of the Fifth Amendment to the United States Constitution. Petitioner has argued that respondent's position that the United States District Court lacks subject matter jurisdiction under Section 242(g) of the IIRIRA 1996 Act and that said statute divested the court of jurisdiction to review the INS decision to execute the final order of deportation or removal is a legal faux paus. That the IIRIRA 1996 Act specifically Section 242(g) does not bar the District Court jurisdiction over an action or claim filed by an alien whose due process rights under the fifth amendment and specifically the seeking of the relief of Suspension of Deportation who is gravely affected by the government's implementation of the IIRIRA 1996 Act. Petitioner cited the case of ***Tefel v. Reno*, No. 97-0805 CIV King (S.D. Fla. May 20, 1997**) where the U.S District Judge James Lawrence King held that: "While Congress may define the jurisdiction of the federal courts, "it may not intrude upon the judiciary's essential function by denying any judicial forum to a plaintiff who asserts a violation of constitutional rights." Petitioner is seeking the mantle of judicial protection of the district court as he is facing imminent deportation and removal from the United States pending the adjudication of his Motion To Reopen before the Board of Immigration Appeals. Petitioner contends that he has a substantial liberty interest at stake predicated on his constitutional right to be afforded the opportunity to present his claim for Suspension of Deportation as a relief from deportation or removal based on new set of facts to be proved upon reopening of his case which are material, relevant and were unavailable or incapable of proof during prior proceedings. Petitioner seeks to prove new evidence of family ties, including his bona fide

marriage to a lawful permanent resident spouse and the birth of his United States Citizen son. These are the two qualifying relatives which can present a close and compelling family relationship that will be adversely affected by Petitioner's deportation from the United States. Petitioner if not given the opportunity to present his case based on new facts will be violative of his right to a hearing consistent with fundamental fairness and due process of law. The Immigration and Naturalization Service right to contest the merits of the application for the relief being sought by petitioner is not being curtailed and waived under any circumstances. Petitioner invoking the principle stated in the case of ***Tefel v. Reno*: "there is strong presumption that the actions of federal agencies are reviewable in the federal courts unless non reviewability is explicitly demonstrated in the statutory language. This presumption is even stronger where denial of review would preclude even colorable constitutional claims. Even where statutes have "facially barred" judicial review, the U.S Supreme Court has interpreted them to permit review of constitutional claims**." The Fifth Circuit reached the same conclusion notwithstanding language in the 1996 Act precluding judicial review. ***Anwar v. INS***, 107 F. 3d 339 (5th Cir. 1997). Thus , as enunciated in these cases, 242(g) does not the court's jurisdiction for several reasons: First, the statute only bars review of the decision or action of the Attorney General. The statute does not bar the review of the decision or actions of lower level government officials. This reading is consistent with principles of statutory construction and doe snot bar lead to unreasonable results. Restricting review of the specific decision of the Attorney General only and not the lower level government officials is consistent with the principle that persons at the highest level of government may be accorded deference while lower officials may not. Thus, if the court sustain defendant's position, then any immigration decision of any person who works, in any way, for the department of Justice would be insulated from review. This interpretation of the cited statute would lead to a complete abolition of all

judicial review for deportation cases commencing before April 1, 1997, a result not commanded by the statutory language. The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to congressional intent. ***Martinez-Montoya v. INS*, 904 F. 2d 1018, 1021 (5th Cir. 1990)**. Petitioner has submitted to the court that under the norms of statutory construction, statutes must be provided common-sense interpretation which will vindicate rather than defeat and eliminate such right.

Petitioner alleged that his Motion to Reopen filed before the Board of Immigration Appeals is timely filed in accordance with 8 C.F.R. 3.23(b). Under the said regulations: "**An alien must file a motion to reopen within 90 days after the date the administrative decision became final or on or before September 30, 1996 whichever is later**. Petitioner submitted to the court that the Board's administrative decision in this case became final only on July 25, 1997, when Petitioner's rehearing was denied in the 9th Circuit Court. This is precisely the original position of the Immigration and Naturalization Service when it filed the Government's Opposition to Respondent's Motion to Reopen and Stay of Deportation. Respondent cited the case of ***Matter of Lok*** to prove its legal point that the administrative decision became final on June 6, 1996. Petitioner has argued that the said decision is not squarely applicable to support such argument. In fact the said case affirms the alien's right to seek review of an adverse decision of the Board in the United States Circuit Court of Appeals pursuant to the provision of section 106 of the Act. Petitioner further argued that to maintain the legal position that the administrative decision became final when the Board of Immigration Appeals entered its decision on June 6, 1996 will lead to illogical and drastic consequences as in fact and in law, reviews, appeals of the decision of the Board of Immigration Appeals when elevated either to the Circuit Court or in a District Court and even to the United States Supreme Court on appropriate legal issues would be

useless and rendered nugatory because the legal and factual issues raised in these courts has already become final when the Board of Immigration Appeals rendered its decision. Petitioner then continue to state that since the Petition for Rehearing in the 9th Circuit Court was denied on July 25, 1997, the filing of the Motion to Reopen on October 16, 1999 before the Board of Immigration Appeals was timely and in accordance with existing rules and regulations.

On November 26, 1997, the United States District Court for the Eastern District of Virginia, Alexandria Division issued the Memorandum Opinion granting Petitioner's petition for writ of habeas and Complaint for Injunctive relief to the following extent: (1) the Court will enjoin Respondent from deporting petitioner until the BIA has considered the merits of his Motion to Reopen and (2) the Court will direct defendant to release Mapoy on bond pending a resolution of his Motion to Reopen. The United States District Court in addressing the issue of habeas jurisdiction noted that despite INA 242 (g) as amended by IIRIRA, the extent to which district courts retain habeas corpus jurisdiction over immigration matters after passage of IIRIRA is highly unsettled. The court has stated that district courts retained the right to consider constitutional habeas claims citing ***Ramallo v. Reno*, 114 F. 3d 1210, 1211-14 (D.C. Circ. 1997)**. The court in granting the habeas petition cited the case of ***Mojica v. Reno*, 970 Supp. 130 (E.D.N.Y. 1997)** which has taken a more expansive view on such issue. The court in its ruling that in **Mojica case**, Judge Weinstein noted recent and past Supreme Court precedent holding that congressional intent to revoke statutory habeas jurisdiction must be explicit and that "repeals by implication are not favored." id. at 159 citing ***Felker v. Turpin***, 116 S. Ct. 2333, 2338 (1996); **see also *Ex Parte Yerger*, 75 U.S. 85 (1868)**. The district court categorically stated that in the context of immigration law, the Supreme Court has ruled that a statutory amendment of federal court jurisdiction did not foreclose 2241 habeas review because the amendment did not specifically address

such review. Thus, examining the IIRIRa provision above, the Court citing Judge Weinstein noted that it did not explicitly foreclose 2241 review , and concluded that the district court therefore retained statutory habeas jurisdiction. According to the Court, the ***Mojica*** reasoning is more persuasive interpretation of IIRIRA"s effect on 2241 habeas jurisdiction. The court then concluded that the INA 242(g), as amended by IIRIRA, does not foreclose the habeas jurisdiction of district courts, and that this Court therefore has subject matter jurisdiction over Petitioner's complaint for declaratory and injunctive relief and the habeas petition.

The district court in addressing the issue of whether petitioner's case is governed by pre-IIRIRA standards for deportation proceedings, or post-IIRIRa standards for removal proceedings concluded that the pe-IIRIRA INA governs deportation proceedings commenced before April 1, 1997, in which the deportation order became administratively final before October 30, 1996. IIRIRA 309(c). Despite the disputed issue on petitioner's case whether the INS decision became administratively final when the BIA denied Petitioner's habeas petition on March 8, 1996, or when the Ninth Circuit denied petitioner's petition for rehearing on July 25, 1997, the Court went to apply the INA provisions which apply to deportation rather than removal.

In addressing the timeliness issue of the Motion to Reopen filed by petitioner before the Board of Immigration Appeals, the Court disagrees with Respondent that the Board of Immigration Appeals' administrative decision was considered final at the time the Board denied petitioner's appeal. The Court disagrees with the interpretation of Respondent concerning the principle enunciated in the ruling of ***Matter of Lok*, 18 I&N Dec. 101 (BIA 1981)**. The Court in disagreeing with the cited ruling in ***Lok* case** stated that ***Lok*** undercuts Respondent's position by making it clear that the finality of any Board decision is contingent on affirmance by a Circuit Court of Appeals. The Court further stated that the Board of Immigration Appeal's denial of petitioner's

appeal was the agency's last administrative action, but this decision did not become truly final until the Ninth Circuit declined to overturn it. The Immigration and Naturalization's subsequent extension of the date scheduled for Petitioner's departure from thirty days after its denial of appeal to thirty days after the Ninth Circuit's order according to the Court reflects this reality. According to the Court, this interpretation accords with 8 C.F.R. 243, which states that, contrary to Respondent's current position, an order of deportation becomes final and subject to execution when a "federal district or appellate court affirms an administrative order of deportation in a petition for review or habeas corpus action. Thus, the Court in its conclusive ruling stated that Petitioner filed his Motion to Reopen on October 17, 1997, less than ninety days after the Ninth Circuit's denial of rehearing on July 25, 1997. Therefore, the Court finds Petitioner's motion was filed in a timely manner. In the Court's mind, there is no doubt that the effect of immediate deportation of Petitioner is obvious and severe as he will be losing the opportunity to present the equities in his favor if he will be removed from the United States. The Court taking into consideration the documentary evidence submitted by Petitioner found that Petitioner who has been in the United States for more than twelve years will be unable to financially support his U.S. permanent resident spouse and his U.S. Citizen child, whose interests are indirectly his own. The Court likewise stated that deprived of his job in the United States, Petitioner will face an uncertain economic future in the Philippines, which continues to experience high unemployment. The Court compares the serious harm that petitioner suffers with the minor harm of administrative delay in deportation. The Court found that Petitioner presents a negligible flight risk. The Court conclusive findings points to the drastic and irreparable consequences to Petitioner and his family if he will be deported without a hearing. The Court then further ruled that the Respondent's decision to detain Petitioner pending deportation is arbitrary , an abuse of discretion in violation of 5 U.S.C. 706(2)(B) and an unnecessary expenditure of

taxpayer resources and use of limited jail space. Thus the Court finally concludes that Petitioner is being held in violation of the laws of the United States.

The Respondent appealed the decision of the United States District Court for the Eastern District of Virginia, at Alexandria to the United States Court of Appeals for the Fourth Circuit. The parties orally argued their case on December 1, 1998 and the U.S Court of Appeals rendered a published decision on July 13, 1999 vacating the district court's decision and remanding it with the instruction to dismiss the Petitioner's complaint and habeas petition for want of subject matter jurisdiction.

In vacating the decision of the District Court, the U.S Court of Appeals Fourth Circuit supported its judgement citing several cases starting with the de novo review of the district court's assertion of jurisdiction with the language of 1252(g) . ***Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 846 (1997); *Alexander S. v. Boyd*, 113 F. 3d 1373, 1383 (4th Cir. 1997) (quoting Robinson, 117 S. Ct. at 846,); *United States v. Wildes*, 120 F. 3d 468, 470 (4th Cir.)** According to the Court of Appeals, the plain or ambiguity of statutory language is determined by reference to the language itself and the word "any" has an expansive meaning which when applied to 1252(g) , "any" mean all, and thus , notwithstanding any other provision of law" to mean that all other jurisdiction-granting statutes including 2241 shall be of no effect. The Court of Appeals addressing the ruling of ***Felker*** concluded that the said ruling provides no support for the conclusion that 1252(g) impermissibly repeals 2241 by implication. According to the U.S Court of Appeals, Congressional intent has been clear and unequivocal that courts shall not have subject matter jurisdiction over claims arising from the actions of the Attorney General enumerated in 1252(g) other than jurisdiction provided by 1252(g). Thereby concluding that the district court could not assert jurisdiction on the habeas petition and citing the case of ***American Arab*, 119 Ct. at 945**. Section 1252 provides that an alien who wishes to

challenge a final order of removal must file a petition for review of sun order in the Court of Appeals. 8 U.S.C.A. 1252(b)(2). The Court of Appeals stated that Petitioner did not and could not avail himself of this review, because the BIA's order denying his Motion to Reopen was not a "final order of removal" for purposes of judicial review under 1252. The Court of Appeals further ruled that petitioner's claim is a thinly veiled attempt to evade the dictates of 1252 and therefore the district court lacked jurisdiction to hear his complaint and habeas petition.

On September 8, 1999, the U.S Court of Appeals denied Petitioner's petition for rehearing. Appendix 2a.

REASON FOR GRANTING THE WRIT

The U.S. Court of Appeals Decision is in conflict with Article I, 9 cl. 2 and the Fifth Amendment of the U.S Constituion and 28 U.S.C. 2241 governing principles on Habeas Corpus Petition

Even though Congress has the power to alter federal court jurisdiction, it cannot do so in a way that would foreclose the court's only effective remedies to redress constitutional rights. Michaelson v. United States, 266 U.S. 42 (1924). Section 2241 provides the power of court to exercise jurisdiction on habeas petitions: "**Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit court**.

Petitioner's complaint for injunction, declaratory relief and habeas petition is predicated on a categorical assertion of his constitutional right to due process where his liberty interest is at stake and where he is denied of the opportunity to be heard to allow him to present his case based on new facts and circumstances that were not present during his initial deportation proceedings. It is not the intent of Congress to alter federal court jurisdiction in a way that it would violate individual rights guaranteed by the constitution. As enunciated in the ruling of ***Tefel v. Reno*, No. 97-0805 CIV**

King (S.D. Fla. May 20, 1997), the court ruled that: "While congress may define the jurisdiction of the federal courts", it may not intrude upon the judiciary's essential function by denying any judicial forum to a plaintiff who asserts a violation of his constitutional rights." The District Court in assuming subject matter jurisdiction over Petitioner's complaint for declaratory relief, injunction and habeas petition is consistent in the performance of its inherent and essential judicial function of allowing an individual who has exhausted all available administrative remedies and has no other judicial recourse or remedy available and where the case presents "grave and serious questions concerning petitioner's liberty and in presenting the appropriate immigration relief to protect that liberty.

While it is true that Section 306 of IIRIRA limits judicial review of particular claims to the provisions of review contained in section 242, it does not in any manner preclude or eliminate district court's subject matter jurisdiction on habeas petitions, complaint for declaratory relief and injunctions to prevent a grave and irreparable harm such as the imminent deportation being faced by petitioner. The Supreme Court's decision in ***Reno v. American-Arab Anti-Discrimination Comm.*, 119 S. Ct. 936** (1999) clarifies the scope of 1252(g) and enumerated only **three discrete actions that the Attorney General may take: her decision or action to "commence proceedings, adjudicate cases, or execute removal orders**." The court is silent and did not squarely addressed the issue of whether or not it bars judicial review of district courts to exercise subject matter jurisdiction on instances or circumstances that explicitly covered by the three discrete actions of the Attorney General. This means that the **great writ** which has been the ultimate weapon of individuals whose liberty rights are greatly affected by decisions or orders of administrative agencies can co-exist with the existing scope of 1252(g) and therefore section 2241 cannot be considered as expressly or implicitly repealed by section 1252 of IRRIRA. Even granting that the word "**any**"

in 1252(g) has an expansive meaning as the Court of Appeals held citing ***United States v. Wildes*, 120 F3d 468, 470 (4t5h Cir. 1997)**, such expansive meaning relates to the defined scope covered by the three discrete actions of the Attorney General. Extending the meaning of **"any" to mean only foreclosing a judicial review by the District Court on a habeas petition leads to absurd consequences**. Can the phrase in section 1242 (g) "Except as provided in this section and notwithstanding any other provision of law, no court shall.... mean that writ of habeas corpus cannot be granted by the Circuit Courts and or the Supreme Court, where the petition for habeas arose from the INS' decision to execute a removal order because 1242(g) says so thereby altering the subject matter jurisdiction on habeas petitions under section 2241? If Section 1242 (g) is indeed clear and unambiguous, how come various circuit courts provided different interpretations on its scope and applicability?. It is true that in ***Felker*, the Supreme Court held that a statute that by its plain terms only removed two types of Supreme Court jurisdiction over second or successive habeas petitions-appellate and certiorari jurisdiction-did not implicitly remove a third-original habeas jurisdiction under 2241**. However, 1252(g) even if it does not repeal specifically enumerated grounds of jurisdiction to the exclusion of others not listed, it cannot mean that this statute is stripping all federal jurisdiction from claims arising from the three enumerated actions of the Attorney General to include habeas jurisdiction under 2241. This in effect is an impermissible repeal by implication.

Petitioner is in imminent danger of deportation and was about to be deported any time where if not for his filing of a complaint for declaratory relief, injunction and habeas petition before the district court. Assuming 1252 provides an alien who wishes to challenge a final order of removal to file a petition for review in the court of appeals, can petitioner avail of such remedy if the order denying his Motion for Stay of Deportation and pending his not yet acted upon Motion to

Reopen was not a "final order of deportation", for purposes of judicial review under 1252? Petitioner is not allowed under the circumstances and the focal issue is where can petitioner seek redress for alleged violation of his constitutional right and to test the legality of his detention?

Petitioner is asserting his right provided him by the constitution, statutes and relevant INS regulations to have his case reopened because of new facts and circumstances in support of his suspension of deportation application as a relief from deportation. Petitioner is not evading the dictates of 1252. For him, the habeas petition (the great writ) which District Courts have exercised subject matter jurisdiction since time immemorial remains the same. It provides a judicial mantle of protection for him in the assertion of his constitutional right to due process. If Congress intended to expressly repeal 2241 by enacting 1252 it should have categorically worded without any ambiguity to include all types of habeas petitions. But such is not the case , because 1252 notwithstanding its expansive scope has a limited coverage and cannot in any way deprive and foreclose subject matter jurisdiction on habeas petitions filed before the District Courts.

CONCLUSION

For the foregoing reasons,petitioner respectfully requests that his Court review on **certiorari** the judgement of the United States Court of Appeals for the Fourth Circuit vacating the decision of the United States District Court for the Eastern District of Virginia and that the Court reversed the judgement thereby sustaining the District Court's exercising subject matter jurisdiction over petitioner's complaint and habeas petition and for such other relief consistent with the certiorari petition.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

ESTANISLAO S. MAPOY,

Plaintiff-Appellee,

v.

WILLIAM CARROLL, District Director, United States Department of Justice, Immigration and Naturalization Service,

Defendant-Appellant.

No. 98-1131

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (CA-97-1827-A)

Argued: December 1, 1998

Decided: July 13, 1999

Before WILLIAMS and MICHAEL, Circuit Judges, and MICHAEL, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Vacated and remanded by published opinion. Judge Williams wrote the opinion, in which Judge Michael and Senior Judge Michael joined.

COUNSEL

ARGUED: James Arthur Hunolt, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Arnedo Silvano

Valera, VALERA & ASSOCIATES, Falls Church, Virginia, for Appellee. **ON BRIEF**: Frank W. Hunger, Assistant Attorney General, David M. McConnell, Assistant Director, Office of Immigration Litigation, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Mark S. Loria, VALERA & ASSOCIATES, Falls Church, Virginia, for Appellee.

OPINION

WILLIAMS, Circuit Judge:

This case is on appeal from the district court's grant of a preliminary injunction staying Estanislao Mapoy's deportation and its accompanying order of Mapoy's release from INS custody. We do not reach the merits of the district court's decision because we conclude that § 242(g) of the Immigration and Nationality Act (INA), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), divested the district court of subject matter jurisdiction to hear this case. Accordingly, we vacate the judgment of the district court and remand this case with the instruction to dismiss for want of subject matter jurisdiction.

I.

Estanislao Mapoy is a native and citizen of the Phillippines who entered the United States on September 3, 1985, on a B-2 tourist visa and has remained in this country illegally for over thirteen years. After attaining seven years of continuous physical presence in the United States, Mapoy became eligible to apply for suspension of deportation pursuant to § 244(a)(1) of the INA, codified at 8 U.S.C.A. § 1254(a)(1). On June 12, 1993, Mapoy requested the issuance of an Order to Show Cause (OSC) why he should not be deported from the United States, so that he might apply for suspension of deportation. On October 26, 1993, the INS served on Mapoy an OSC charging him as deportable under § 241(a)(1)(B) of the INA,

codified at 8 U.S.C.A. § 1251(a)(1)(B) (redesignated by IIRIRA § 305(a)(2) as INA § 237(a)(1)(B), to be codified at 8 U.S.C.A. § 1227(a)(1)(B)), for having remained illegally in the United States. Mapoy then applied for a suspension of deportation pursuant to INA § 244(a)(1) on the basis of extreme hardship. At a hearing before an immigration judge (IJ) on February 1, 1994, Mapoy conceded deportability and designated the Phillippines as the country of deportation. On March 6, 1995, the IJ denied Mapoy's application and gave Mapoy until June 6, 1995, to depart voluntarily or be subject to an order of deportation. Mapoy appealed this decision to the Board of Immigration Appeals (BIA), which denied the appeal on March 8, 1996, and extended Mapoy's voluntary departure date to thirty days after its decision (the Voluntary Departure Order).

On August 15, 1996, Mapoy filed a petition for review of the Voluntary Departure Order with the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit denied the petition on May 20, 1997. Mapoy then filed a petition for rehearing with the Ninth Circuit, which refused to rehear the case on July 25, 1997. The Ninth Circuit issued a final order memorializing its decision on August 5, 1997. The BIA then reset Mapoy's date for voluntary departure to thirty days after the issuance of the Ninth's Circuit's order. When Mapoy failed voluntarily to depart the United States within thirty days of the Ninth Circuit's decision, the alternate order of deportation issued in 1995 by the IJ became immediately effective. A warrant of deportation was issued and Mapoy was ordered to report for deportation on or around November 14, 1997.[1]

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[1] We are unable to determine from the record exactly when Mapoy was ordered to report for deportation and when he was scheduled to be deported. *Compare* Mot. to Reopen (Mapoy deportation scheduled for November 10) *with* Nov. 14, 1997 TRO Hr'g Tr. at 3 (Mapoy deportation scheduled for November 14) *with* Oct. 30, 1998 BIA Order (Mapoy ordered to report for deportation on November 17).

After the initial proceedings were completed, Mapoy launched a second attack against his impending deportation. On October 16, 1997, Mapoy filed a Motion to Reopen his deportation proceedings and for a Stay of Deportation with the BIA. In his Motion, Mapoy sought cancellation of removal pursuant to INA § 240A, and adjustment of status.[2] Mapoy based his Motion to Reopen on new circumstances that were not present at his 1993 application for suspension of deportation, including his marriage to a legal permanent resident, who was expecting their first child and would be qualified to become a U.S. citizen in September 1998, and an approved I-130 relative visa petition his spouse had filed on his behalf.[3] Mapoy's child was born on October 30, 1997, and is a U.S. citizen.

Pursuant to the warrant of deportation, Mapoy voluntarily surrendered to INS custody on November 10, 1997. On the same day, the BIA denied Mapoy's Motion for a Stay of Deportation, concluding that his Motion to Reopen was untimely and not likely to be granted. The INS District Director also denied Mapoy's request for a stay of deportation.

While his deportation was pending, Mapoy began the proceedings that are the subject of this appeal: he filed a Complaint for Declaratory and Injunctive Relief and Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Virginia on November 14, 1997, seeking a stay of deportation and release from

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[2] In its Opposition to Respondent's Motion to Reopen and to Stay Deportation, the INS argued that as a matter of law Mapoy was not eligible for cancellation of removal because the provisions of INA § 240A apply only to aliens in removal proceedings, not to aliens in deportation proceedings. In a Supplemental Motion to Reopen filed November 10, 1997, Mapoy requested the relief of suspension of deportation.

[3] In a Supplemental Motion to Reopen filed November 12, 1997, Mapoy alleged ineffective assistance of counsel as an additional ground for his Motion to Reopen.

detention. Also on November 14, 1997, Mapoy filed a Notice and Motion for Preliminary Injunctive Relief and a Restraining Order to Stay Deportation. At a brief hearing on November 14, 1997, the INS agreed that it would not deport Mapoy until the district court considered his complaint and habeas petition. On November 18, 1997, the INS filed an Opposition to the Motion for Injunctive Relief and Petition for Writ of Habeas Corpus, contending that § 242(g) of the INA, as amended by IIRIRA, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, divested the district court of jurisdiction over the INS's decision to execute Mapoy's removal order. In the alternative, the INS argued that an injunction should not issue because Mapoy failed to show a substantial likelihood of success on the merits of his Motion to Reopen.

The parties presented oral argument to the district court on Mapoy's complaint and habeas petition on November 19, 1997. Mapoy argued that the district court possessed jurisdiction over this case under IIRIRA, that his Motion to Reopen was timely filed, that the equities favored a stay of deportation, and that he should be released from INS custody because he was not a flight risk. The INS argued that motions to reopen are highly disfavored, that the regulations do not provide an alien with the opportunity to reopen his case continuously whenever new facts arise, that Mapoy is barred from receiving the relief he seeks because he stayed past his voluntary departure date, and that Mapoy was a flight risk. In a Memorandum Opinion and Order dated November 26, 1997, the district court found that it had jurisdiction, found that the Motion to Reopen was timely filed, enjoined the Immigration and Naturalization Service (INS) from deporting Mapoy until the BIA had considered the merits of his Motion to Reopen, and directed the INS to release Mapoy on bond from custody pending resolution of his motion. On December 1, 1997, the district court remanded the case to the BIA for

reconsideration of Mapoy's motion.[4] The INS filed a notice of appeal on January 23, 1998.

II.

We first must consider whether the district court correctly asserted subject matter jurisdiction over Mapoy's complaint and habeas petition. The district court's assertion of jurisdiction is a legal determination that this Court reviews de novo. *See Yarnevic v. Brink's, Inc.*, 102 F.3d 753, 754 (4th Cir. 1996); *Ahmed v. United States*, 30 F.3d 514, 516 (4th Cir. 1994). Although Congress possesses plenary power to restrict the jurisdiction of the federal courts over immigration decisions, *see Carlson v. Landon*, 342 U.S. 524, 537 (1952), aliens held in custody of federal immigration officials have traditionally been able to obtain review of all administrative decisions by petitioning for a writ of habeas corpus, *see Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953) (upholding Congress's authority to preclude judicial intervention in deportation cases, but recognizing that aliens could attack deportation orders by habeas corpus).

Enacted on September 30, 1996, IIRIRA altered the way in which aliens could obtain judicial review of deportation orders. Section 306 of IIRIRA repealed the entire judicial review scheme in INA § 106, codified at 8 U.S.C. § 1105a, and replaced it with a new judicial review scheme in INA § 242, codified at 8 U.S.C. § 1252. *See* IIRIRA § 306. Significantly, this new judicial review scheme limits judicial review of particular claims to the provisions for review contained in § 242. New INA § 242(g) provides that:

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[4] After the district court decision and just prior to oral argument in this appeal, the BIA granted Mapoy's Motion to Reopen and remanded the case to the IJ for further proceedings. The BIA based its decision on the district court order mandating the BIA's consideration of Mapoy's new circumstances. The district court order is vacated for the reasons discussed herein.

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C.A. § 1252(g) (West 1999). Section 1252(g) went into effect on April 1, 1997, *see INS v. Yang*, 117 S. Ct. 350, 352 n.l (1996), while Mapoy's petition for review of the Voluntary Departure Order was pending in the Ninth Circuit. Congress expressly provided that § 1252(g) applies "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings." IIRIRA § 306(c)(1).

The Supreme Court recently clarified the scope of § 1252(g) in *Reno v. American-Arab Anti-Discrimination Comm.*, 119 S. Ct. 936 (1999). In *American-Arab*, the Court addressed the apparent tension between IIRIRA § 306(c)(1), described above, and IIRIRA § 309(c)(1), which sets forth the general rule that the judicial-review procedures of § 1252 do not apply to aliens who were already in exclusion or deportation proceedings on IIRIRA's effective date. *See id.* at 940-41. In resolving this tension, the Supreme Court rejected "the unexamined assumption that § 1252(g) covers the universe of deportation claims" and held that § 1252(g) applied "only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.' " *Id.* at 943. The Court reasoned that these three actions are stages of the deportation process at which the Executive has discretion to go forward or to abandon the endeavor and that § 1252(g) was designed to prevent judicial intervention into these actions outside the streamlined process Congress had designed. *See id.* at 943-44. The Supreme Court concluded that "[i]n cases to which § 1252(g) applies, the rest of § 1252 is incorporated through the '[e]xcept as provided in this section' clause." *Id.* at 945 (second alteration in original).

Mapoy's refusal to depart voluntarily resulted in an automatic order of deportation being entered against him, which the INS sought to enforce. Once Mapoy was detained pending deportation, he filed the instant claim for injunctive relief and a writ of habeas corpus. The basis for Mapoy's claim was the BIA's order denying his Motion for Stay of Deportation and its continued detention of Mapoy. His underlying motion for a stay clearly related to the BIA's execution of a removal order. Thus, Mapoy's complaint and habeas petition clearly arose from the INS's decision to execute a removal order and is subject to § 1252(g).[5]

Applying § 1252(g) to Mapoy's case, the district court concluded that it was not divested of general habeas jurisdiction pursuant to § 2241.[6] Following *Mojica & Navas v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997), the district court first noted that "repeals by implication are not favored." (J.A. at 24 (internal quotation marks omitted).) The district court then cited *Felker v. Turpin*, 116 S. Ct. 2333 (1996), for the proposition that a statutory amendment of federal court jurisdiction does not foreclose § 2241 habeas review if it does not specifically address such review. Finally, the district court concluded that because § 1252(g) did not explicitly foreclose § 2241 review, the court retained statutory habeas jurisdiction.

We begin our de novo review of the district court's assertion of jurisdiction with the plain language of § 1252(g). *See Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 846 (1997). "If the 'statutory language is unambiguous and the statutory scheme is coherent and consistent,' our inquiry ends."

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[5] "[A]ny reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation." IIRIRA § 309(d)(2).

[6] "The district court's decision preceded the Supreme Court's decision in *Reno v. American-Arab Anti-Discrimination Comm.*, 119 S. Ct. 936 (1999). The district court's reasoning is relevant, however, because we have concluded that § 1252(g), as interpreted by the Supreme Court in *American-Arab*, applies to Mapoy's case.

Alexander S. v. Boyd, 113 F.3d 1373, 1383 (4th Cir. 1997) (quoting Robinson, 117 S. Ct. at 846), *cert. denied*, 118 S. Ct. 880 (1998)." " ' The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole.' " *Id.* (quoting *Robinson*, 117 S. Ct. at 846). "In interpreting statutory language, words are generally given their common and ordinary meaning." *Id.*

Our preliminary inquiry involves the language and context of the clause "[e]xcept as otherwise provided in this section and notwithstanding any other provision of law." The word "any' is a term of great breadth." *United States v. Wildes*, 120 F.3d 468, 470 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 885 (1998); *see also Black's Law Dictionary* 94 (6th ed. 1990) (defining "any" to mean "[s]ome; one out of many; an indefinite number," that depending on the context and subject matter of the statute, "may be employed to indicate "all" or every' "). "Read naturally, the word 'any' has an expansive meaning, that is, "one or some indiscriminately of whatever kind." ' " *Wildes*, 120 F.3d at 470 (quoting *United States v. Gonzales*, 117 S. Ct. 1032, 1035 (1997) (quoting *Webster's Third New Int'l Dictionary* 97 (1976))). Because "[e]xcept as otherwise provided in this section," connotes a singular exception to the general rule in § 1252(g) that jurisdiction is stripped from the enumerated claims, we interpret "any" to mean "all," and, thus, "notwithstanding any other provision of law" to mean that all other jurisdiction-granting statutes, including § 2241, shall be of no effect. *Cf. United States v. Fernandez (Appeal of U.S. by Att'y Gen.)*, 887 F.2d 465, 468 (4th Cir. 1989) (interpreting "notwithstanding any other provision of law" language in Ethics in Government Act to "naturally mean[ ] that the conferral of prosecutorial powers [on the independent counsel] should not be limited by other statutes").

Contrary to the district court's belief, *Felker* provides no support for the conclusion that § 1252(g) impermissibly

repeals § 2241 by implication. In *Felker*, the Supreme Court addressed the issue of whether its original habeas jurisdiction under § 2241 was repealed by § 106(b)(3)(E) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, 1221, which provides that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application [for habeas relief] shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C.A. § 2244(b)(3)(E) (West Supp. 1999). In interpreting this provision, the Supreme Court reasoned:

> Although § 106(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court.

Felker, 116 S. Ct. at 2338-39. The Supreme Court concluded that to find that § 106(b)(3)(E) repealed original habeas jurisdiction under § 2241 would effect an impermissible repeal by implication. *See id.* at 2339.

In *Felker*, the Supreme Court held that a statute that by its plain terms only removed two types of Supreme Court jurisdiction over second or successive habeas petitions — appellate and certiorari jurisdiction — did not implicitly remove a third — original habeas jurisdiction under § 2241. *See id.* at 2338-39. Unlike the statute at issue in *Felker*, § 1252(g) does not repeal specifically enumerated grounds of jurisdiction to the exclusion of others not listed, but strips all federal jurisdiction from claims arising from the three enumerated actions of the Attorney General with the sweeping clause "[e]xcept as provided in this section and notwithstanding any other provision of law." Because this clause, as we concluded above, clearly encompasses habeas jurisdiction under § 2241, it is sufficient to satisfy *Felker*.

In sum, Congress could hardly have been more clear and unequivocal that courts shall not have subject matter jurisdiction over claims arising from the actions of the Attorney General enumerated in § 1252(g) other than jurisdiction that is specifically provided by § 1252. The district court, therefore, could not assert jurisdiction over Mapoy's claim challenging the BIA's execution of an order of deportation entered against him unless such jurisdiction is conferred by § 1252. *See American-Arab*, 119 S. Ct. at 945. Section 1252 provides that an alien who wishes to challenge a final order of removal must file a petition for review of such an order in the court of appeals. *See* 8 U.S.C.A. § 1252(b)(2). Mapoy did not, and could not, avail himself of this review, because the BIA's order denying his Motion for Stay of Deportation pending his not-yet-acted-upon Motion to Reopen was not a "final order of removal" for purposes of judicial review under § 1252. *See, e.g., Akrap v. INS*, 966 F.2d 267, 270 (7th Cir. 1992) (holding that BIA's order denying a motion for stay of deportation was not a "final order of deportation" for purposes of judicial-review provisions of 8 U.S.C. § 1105a(a)); *Vlassis v. INS*, 963 F.2d 547, 549 (2d Cir. 1992) (same); *Reid v. INS*, 766 F.2d 113, 115-16 (3d Cir. 1985) (same). Because Mapoy's claim is a thinly veiled attempt to evade the dictates of § 1252, we hold that the district court lacked jurisdiction to hear his complaint and habeas petition.[7]

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[7] Because Mapoy is a non-criminal alien who received judicial review of his challenge to the final order of deportation entered against him, we do not address the issue that has split the circuits — whether IIRIRA's stripping of all jurisdiction, including habeas jurisdiction under § 2241, over a claim by a criminal alien violates the Suspension Clause. *Compare Richardson v. Reno*, 162 F.3d 1338, 1357 (11th Cir. 1998) (holding that § 1252(g) precludes § 2241 habeas jurisdiction over all immigration decisions), *vacated for further consideration*, 1999 WL 105597 (June 1, 1999) and *Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir.) (stating in dicta that "[§ 1252(g)] abolishes even review under § 2241, leaving only the constitutional writ, unaided by statute"), *cert. denied*, 118 S. Ct. 624 (1997), with *Sandoval v. Reno*, 166 F.3d 225, 236-38 (3d Cir. 1999)

III.

In sum, we conclude that the district court erred in holding that it had jurisdiction over Mapoy's complaint and habeas petition. Because our jurisdictional conclusion is dispositive of this case, we do not review the merits of the district court's decision.[8] We therefore vacate the district court's decision and remand with the instruction to dismiss Mapoy's complaint and habeas petition for want of subject matter jurisdiction.

VACATED AND REMANDED

(holding that § 1252(g) does not eliminate § 2241 habeas jurisdiction in part to avoid "serious constitutional problems" that would arise if § 1252(g) was interpreted to remove all review of executive detention), *Goncalves v. Reno*, 144 F.3d 110, 121-23 (1st Cir. 1998) (same), *cert. denied*, 119 S. Ct. 1140 (1999), and *Jean-Baptiste v. Reno*, 144 F.3d 212, 219-20 (2d Cir. 1998) (same).

[8] We note that the INS had a credible basis to argue that the Voluntary Departure Order constituted the final administrative order for purposes of determining the timeliness of Mapoy's Motion to Reopen, *see* 8 C.F.R. § 241.31 (1998), but due to our disposition on jurisdictional grounds, we do not address whether the district court erred in finding that Mapoy's Motion to Reopen was timely.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUT

FILED
September 8, 1999

No. 98-1131
CA-97-1827-A

ESTANISLAO S. MAPOY
Plaintiff - Appellee

v.

WILLIAM CARROLL, District Director, United States Department of Justice, Immigration and Naturalization Service
Defendant - Appellant

ORDER

The appellee has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor

CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT
LEWIS F. POWELL, JR. UNITED STATES COURTHOUSE ANNEX
1100 EAST MAIN STREET, SUITE 501
RICHMOND, VIRGINIA 23219-3517

PATRICIA S. CONNOR
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September 8, 1999

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Re: 98-1131 Mapoy v. Carroll
CA-97-1827-A

Dear Counsel:

Enclosed is a copy of an order filed today in this case.

Yours truly,

PATRICIA S. CONNOR
Clerk

/s/ Joy Hargett
By. _____
Deputy Clerk

Enclosure(s)

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

ESTANISLAO S. MAPOY

Petitioner/Plaintiff

v.

WILLIAM CARROLL, INS District Director U.S. Department of Justice, Immigration and Naturalization Service

Respondent/Defendant

Civil Action No. 97-1827-A

MEMORANDUM OPINION

I.

Petitioner/plaintiff Estanislao Mapoy is a native and citizen of the Phillippines who entered the United States on September 3, 1985 on a B-2 tourist visa and has remained in this country illegally for the last twelve years. Mapoy has a variety of relatives living in the United States as legal permanent residents ("LPRs") or citizens.

On October 26, 1993, the Immigration and Naturalization Service ("INS") charged Mapoy as deportable under Immigration and Naturalization Act ("INA") §241(a)(1)(B) for having remained illegally in the United States. Mapoy then applied for a suspension of deportation pursuant to INA §244(a)(1) on the basis of extreme hardship. On March 6, 1995, an Immigration Judge ("IJ") denied his application. Petitioner was given until June 6, 1995, to voluntarily depart, or be subject to an order of deportation.

Mapoy appealed the decision to the Board of Immigration Appeals ("BIA"); the Board denied the appeal on March 8, 1996, and extended Mapoy's voluntary departure date to thirty days after its decision. Within two months of the Board's decision, Mapoy married Eulogia Dionisio, a Filipino LPR, and later conceived a child with her.

On August 15, 1996, Mapoy filed a petition for review of the BIA decision with the Ninth Circuit. The Ninth Circuit denied the petition on May 20, 1997. Mapoy filed a petition for rehearing with the same court which denied rehearing on July 25, 1997. The Ninth Circuit issued an accompanying order on August 5, 1997. The BIA reset Mapoy's date for voluntary departure to thirty days after the issuance of the Ninth Circuit's order. However, Mapoy did not depart within that period.

Instead, on October 16, 1997, Mapoy filed a Motion to Reopen and for a Stay of Deportation with the BIA. In his Motion to Reopen, Mapoy asked the BIA to grant him a "cancellation of removal" pursuant to INA §240A, as amended by the Illegal Immigration Reform and Responsibility Act of 1996 ("IIRIRA").[1] Mapoy based his

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[1] Congress enacted IIRIRA on September 30, 1996. The Act amended the INA in part by consolidating deportation and exclusion proceedings under the single heading of "removal proceedings." Thus, in his Motion to Reopen, Mapoy seeks a "cancellation of removal" rather than a "suspension of deportation." Defendant argues that because Mapoy is in "deportation" proceedings initiated before passage of IIRIRA rather than "removal" proceedings, he is seeking an inappropriate form of relief, and his Motion to Reopen should be denied on this basis. Although it is true that deportation proceedings commenced prior to April 1, 1997 (the effective date of the Act) are not governed by post-IIRIRA standards for "removal," see discussion of applicable statute infra, Mapoy's technical error in styling his motion should not prevent the BIA from considering the equities in favor of a suspension of deportation. Indeed, the decision Mapoy seeks to reopen is the Board's decision on his eligibility for suspension. As such, this Court considers the merits of his Motion to Reopen in light of Mapoy's claim of new circumstances favoring suspension.

motion on new circumstances: since his prior application, Mapoy had married an LPR who will be qualified to become a U.S. citizen as of September, 1998; she had in turn filed an approved I-130 relative visa petition on his behalf. In addition, Mapoy referred to the pending birth of his child. That child was born on October 30, 1997, and is a U.S. Citizen. The BIA summarily denied Mapoy's Motion for Stay without deciding his Motion to Reopen. As such, the BIA has not yet considered the merits of Mapoy's allegation of new circumstances. Mapoy also filed a request for a stay with defendant which defendant denied.

Finally, Mapoy applied to the BIA for an emergency stay of deportation. The BIA denied this application on November 10, 1997, concluding that Mapoy's Motion to Reopen was filed outside the time limits set forth at 8 C.F.R. §3.2(c)(2), and that "there is little likelihood that the motion [to reopen] will be granted." *See* BIA Order of November 10, 1997.

Mapoy then filed his petition and Complaint in this Court on Friday, November 14, 1997. At a brief hearing, defendant agreed that it would not deport Mapoy until the Court had considered his Complaint and Petition for Writ of Habeas Corpus. The parties presented oral argument to the Court on Mapoy's petition/Complaint on Wednesday, November 19, 1997.

In his petition/Complaint, Mapoy argues that defendant has committed an abuse of discretion in violation of 5 U.S.C. § 706(2)(B) by denying him a stay of deportation and detaining him. Accordingly, Mapoy asks the Court to enjoin defendant from deporting him until the INS has considered the merits of his Motion to Reopen, and to issue a writ of habeas corpus directing defendant to release him pending an adjudication of the merits of his claims.

II.

HABEAS JURISDICTION

As an initial matter, defendant contends that this Court lacks subject matter jurisdiction over Mapoy's habeas petition. INA §242(g), as amended by IIRIRA, provides that:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to ... execute removal orders against any alien in this chapter."

Based on this provision, defendant argues that this Court is precluded from exercising habeas jurisdiction over Mapoy's petition pursuant to 28 U.S.C. §2241. However, the extent to which district courts retain habeas corpus jurisdiction over immigration matters after passage of IIRIRA is highly unsettled. For example, the D.C. Circuit has interpreted this provision as depriving district courts of subject matter jurisdiction, including §2241 habeas jurisdiction, over actions of the Attorney General on orders of deportation, but noted that district courts retained the right to consider constitutional habeas claims. *See Ramallo v. Reno*, 114 F.3d 1210, 1211-14 (D.C. Cir. 1997).

The Eastern District of New York has taken a more expansive view. *See Mojica and Navas v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997). In *Mojica*, Judge Weinstein noted recent and past Supreme Court precedent holding that congressional intent to revoke statutory habeas jurisdiction must be explicit and that "repeals by implication are not favored." Id. at 159 (citing *Felker v. Turpin*, 116 S. Ct. 2333, 2338 (1996)); *see also Ex Parte Yerger*, 75 U.S. 85 (1868). In the context of immigration law, the Supreme Court has ruled that a statutory amendment of federal court jurisdiction did not foreclose §2241 habeas review because the amendment

did not specifically address such review. *See Felker*, 116 S. Ct. at 2338. Examining the IIRIRA provision above, Judge Weinstein noted that it did not explicitly foreclose §2241 review, and concluded that the district court therefore retained statutory habeas jurisdiction. See Mojica, 970 F. Supp. at 159-61.

This Court finds the reasoning in *Mojica* to be the more persuasive interpretation of IIRIRA's effect on §2241 habeas jurisdiction. Accordingly, this Court concludes that INA §242(g), as amended by IIRIRA, does not foreclose the habeas jurisdiction of district courts, and that this Court therefore has subject matter jurisdiction over Mapoy's petition.

APPLICABLE STATUTE

The parties have expressed some confusion as to whether Mapoy's case is governed by pre-IIRIRA standards for deportation proceedings, or post-IIRIRA standards for removal proceedings. The pre-IIRIRA INA governs deportation proceedings commenced before April 1, 1997, in which the deportation order became administratively final before October 30, 1996. See IIRIRA §309(c). Here, it is disputed whether the INS decision became administratively final when the BIA denied Mapoy's appeal on March 8, 1996, or when the Ninth Circuit denied Mapoy's petition for rehearing on July 25, 1997. However, with the exception of habeas jurisdiction, defendant has sought to defend its actions under pre-IIRIRA standards for deportation proceedings. Accordingly, this Court will apply those INA provisions which apply to deportation rather than removal.

THE *BLACKWELDER* STANDARD

In deciding whether to grant preliminary injunctive relief, the Court must undertake a "flexible" inquiry considering four factors: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to defendant if the requested relief is

granted; (3) the likelihood that plaintiff will succeed on the merits; and (4) the public interest. *See Federal Leasing Co. v. Underwriters at Lloyd's*, 650 F.2d 495, 499 (4th Cir. 1981)(citing *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977)). If a balancing of the respective hardships to plaintiff and defendant "is struck in favor of plaintiff, it is enough that grave or serious questions are presented and plaintiff need not show a likelihood of success" on the merits. *Blackwelder*, 550 F.2d at 196.

IRREPARABLE HARM

The effect of immediate deportation on Mapoy is obvious and severe -- he will lose the opportunity to present the equities in his favor and will effectively be banished from the country where he has lived without incident for the past twelve years. More importantly, Mapoy will be unable to financially support his wife and to assist in raising his infant child, whose interests are indirectly his own. Deprived of his job in the United States, Mapoy will face an uncertain economic future in the Phillippines, which continues to experience high unemployment and can be expected to share in the recent misfortunes of several nearby Asian economies. Deporting Mapoy without a determination on the merits of his Motion to Reopen effectively eliminates his chance to remain in this country and assures wrenching changes in his life and that of his family, including his U.S. citizen son.

HARM TO DEFENDANT

By allowing Mapoy to remain in this country pending a consideration of his motion, defendant suffers at most a minor administrative delay in deportation. Furthermore, because Mapoy presents a negligible flight risk, he may be released on bond while he awaits the Board's decision, minimizing the cost to the government of delaying deportation. This Court is sensitive to defendant's concern that any delay in deportation strengthens the equities in Mapoy's favor, but this concern must be weighed against the drastic and irreparable

consequences to Mapoy and his family of deportation without a hearing. The Court finds that the balance of these harms weighs heavily in Mapoy's favor.

LIKELIHOOD OF SUCCESS ON THE MERITS

The BIA, which would decide Mapoy's Motion to Reopen, has indicated that it considers Mapoy's motion to be time barred by 8 C.F.R. § 3.2(c)(2). *See* BIA Order of November 10, 1997. Accordingly, defendant argues that Mapoy's Motion to Reopen is likely to fail, and that this Court should decline to grant injunctive relief. 8 C.F.R. §3.23(c)(2) requires that a motion to reopen be filed within ninety days from when a "final administrative decision was rendered in the proceeding" or by September 30, 1996, whichever is later. Mapoy filed his Motion to Reopen on October 16, 1997, within ninety days of the Ninth Circuit's July 25, 1997, denial of his petition for rehearing. Mapoy calls this circuit court action the "final administrative decision" for purposes of the regulation. Defendant argues that the BIA's March 8, 1996, decision to deny Mapoy's appeal was the "final administrative decision." Neither side provided this Court with relevant authority to support its view. Moreover, defendant has previously argued that the BIA's decision became final on July 25, 1997, for the purpose of determining when Mapoy could exercise his right of voluntary departure. Defendant continues to assert this inconsistent position, arguing that Mapoy has failed to depart within thirty days of a final administrative decision concerning his deportation.[2]

Defendant also argues that, under 8 C.F.R. §243.1, an order of deportation becomes final upon dismissal of an appeal by the BIA. *See* 8 C.RF.R. § 243.1. Furthermore,

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[2] *See* Defendant's opposition to Mapoy's Motion to Reopen at 3. The IJ granted Mapoy the option to voluntarily depart within 30 days of a final administrative decision. When he failed to do so, he became subject to an order of deportation.

defendant notes that the authority of Article III appellate courts to review administrative determinations of deportability is limited. *See Matter of Lok*, 18 I&N Dec. 101 (BIA 1981). In *Lok*, the BIA stated that:

> Where an administrative appeal has been taken, the alien is entitled to seek review of an adverse decision of the Board in the United States Circuit Courts of Appeals . ... However, in contrast to the Board's de novo review powers, the appellate court's scope of review is limited. Assuming no error of law or unfairness in procedure, the court must affirm the administrative order or deportation order if the order is supported by reasonable, substantial, and probative evidence of record.

Id. Based on these authorities, defendant now argues that the BIA's administrative decision must be considered final at the time the BIA denied Mapoy's appeal.

This Court disagrees. *Lok* undercuts defendant's position by making it clear that the finality of any Board decision is contingent on affirmance by a Circuit Court of Appeals. *See id.* Here, the BIA's denial of Mapoy's appeal was the agency's last administrative action, but this decision did not become truly final until the Ninth Circuit declined to overturn it. The agency's subsequent extension of the date scheduled for Mapoy's departure from thirty days after its denial of appeal to thirty days after the Ninth Circuit's order reflects this reality. For the same reason, defendant argued in its Opposition to Mapoy's Motion to Reopen that "[t]he Board's decision in this case became final when respondent's petition for rehearing was denied [by the Ninth Circuit] on July 25, 1997". *See* Defendant's Opposition to petitioner's Motion to Reopen at 3. This interpretation accords with 8 C.F.R. §243.3, which states that, contrary to defendant's current position, an order of deportation becomes final and subject to execution when "a federal district or appellate court affirms an administrative order of deportation in a petition for review or habeas corpus action." Mapoy filed his Motion to Reopen on

October 17, 1997, less than ninety days after the Ninth Circuit's denial of rehearing on July 25, 1997. As such, Mapoy's motion was filed in a timely manner.

Having determined that the Board's concerns about timeliness do not present an obstacle to his Motion to Reopen, this Court must consider the merits of Mapoy's motion. Because this Court finds that the balance of hardships weighs heavily in Mapoy's favor, it is enough for *Blackwelder* purposes that where "grave or serious questions are presented ... plaintiff need not show a likelihood of success on the merits". *Blackwelde*r, 550 F.2d at 196.

The Court finds that Mapoy's Motion to Reopen presents "grave" and "serious" questions concerning his application for suspension. Specifically, Mapoy has an LPR wife, a U.S. citizen child, and an approved relative visa petition filed on his behalf, none of which he had when he initially applied for suspension. Furthermore, Mapoy alleges that ineffective assistance of his prior counsel adversely affected his ability to obtain relief through the administrative process.[3] Although it

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[3] For example., Mapoy remained in the United States after the date scheduled for his voluntary departure. As a result, defendant claims that Mapoy is barred by INA §242b(e)(2)(A) from seeking suspension of deportation or adjustment of status for a period of five years after his voluntary departure date. Mapoy alleges that, as a result of ineffective counsel, he failed to either file his Motion to Reopen well in advance of his scheduled departure, or to petition the BIA to extend his departure date. If true, this ineffective assistance may constitute the "exceptional circumstances" which allow an alien to seek suspension despite a failure to depart as agreed. *See* INA §242b(e)(2)(A). Mapoy should be allowed to present evidence on this issue.

Even if the Board determines that the §242b(e)(2)(A) prohibition applies, Mapoy may be entitled to adjustment under INA §245 (i) . *See* INA §245 (i) , 8 U.S.C. §1255 (i) . Under this provision, an alien physically present in the United States who "entered the United States without inspection may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence." INA §245(i), 8 U.S.C. §1255(i) (1997). Furthermore, INA §245(i) is about to be amended yet again. Congress recently passed the

is true that; Mapoy has not yet made the evidentiary submission on ineffective a assistance required by *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1)BS) , and *Figueroa v INS*, 886 F.2d 76 (4th Cir. 1989) , his allegations are serious enough that he should be allowed the opportunity, to do so before the Board. Mapoy has therefore made the showing on the merits required under *Blackwelder* to justify a preliminary it injunction. *See Blackwelder*, 550 F.2d at 196.

DETENTION

INS §242(c) provides that the Attorney General has six months after a final determination of deportability by the agency or an Article III court in which to effect deportation. See INA §242 (c), E U.S.C. §1252(c). Until that time, the Attorney General has the discretion to detain the alien or allow him to remain free on bond. *See id.* Section 242 (c) further provides that:

> Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusion showing in habeas corpus proceedings that the attorney General is not proceeding with such reasonable dispatch as may be

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1998 Commerce, Justice, State and Judiciary Appropriations Bill ("CJS"); the President is expected to sign the bill within 10 days. The bill amends §245(i) to provide that:

> an alien physically present in the United States who entered the United States without inspection and who is the beneficiary of a petition for classification under 204 that was filed with the Attorney General on or before January 14, 1998 ... may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

CJS at §121(a). Although their interaction with INA §242 (g) is unclear, the Court notes that Mapoy might be entitled to relief under either version of §245(i).

> warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States.

Id. Based on the above language, defendant argues that this Court may not review the Attorney General's exercise of discretion absent a showing that the Attorney General has failed to act with "reasonable dispatch" in deporting Mapoy. This Court disagrees. As with INA §242(g), nothing in the language of §242 (c) specifically addresses or limits this Court's habeas jurisdiction under 28 U.S.C. §2241. Nor does INA §242 (c) state that the habeas review provided therein is to be the only habeas review permitted of the Attorney General's actions. In the absence of express language limiting §2241 habeas review, this Court agrees with the Supreme Court and the Eastern District of New York that restrictions of statutory habeas by implication are disfavored. *See Mojica and Navas v. Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997); *see also Felker v. Turpin*, 116 S. Ct. 2333, 2338 (1996); *Ex Parte Yerger*, 75 U.S. 85 (1868).

In *Ghalamsiah v. INS*, 806 F.2d 68 (3d Cir. 1986), cited by defendant, the court concluded that §242 (c) did not preclude normal habeas review. Instead, the court concluded that §242 (c) allowed it to grant habeas relief either because the detention was unlawful or because the Attorney General had failed to act with "reasonable dispatch." Id. at 73. In light of the above authorities, this Court concludes that its authority to review defendant's actions is not limited to cases in which the Attorney General has failed to act with "reasonable dispatch."

Here, Mapoy argues that he is being held in violation of 5 U.S.C. §706(2)(A) because defendant's decision to detain him pending a resolution of his motion or deportation was "arbitrary, capricious, [and] an abuse of discretion." 5 U.S.C. §706 (2) (A) ; *see also* 28 U.S.C. §2241(c)(3) (habeas relief available to prisoner held in violation of laws of United States). In regard to such claims, the Fourth Circuit has indicated that the decisions of a district director concerning

detention are reviewable on an abuse of discretion standard. *See Ogorodnikov v. INS*, No. 92-7150, 1993 WL 192766 (4th Cir. June 7, 1993)(unpublished decision). In that case, the Fourth Circuit held that the Arlington district director did not abuse his discretion in continuing the detention of an alien convicted of espionage beyond six months where the alien had hampered the progress of deportation proceedings and posed a security risk if released. *Id.* at *2. Accordingly, this Court may review the defendant's decision to detain Mapoy on an abuse of discretion standard.

Examining the defendant's detention decision, this Court finds that Mapoy does not pose the risk of flight needed to justify detaining him. Although Mapoy failed to depart as scheduled, he has an established family in this area and no criminal history other than his illegal alien status. Furthermore, it was Mapoy himself who initiated INS review of his status when he asked the INS to issue an Order to Show Cause why he should not be deported. Mapoy initiated the current proceedings against him in an attempt to establish his right to remain in the United States legitimately. As such, the defendant's decision to detain Mapoy pending deportation is arbitrary, an abuse of discretion in violation of 5 U.S.C. § 706(2)(B), and an unnecessary expenditure of taxpayer resources and use of limited jail space. Accordingly, this Court finds that Mapoy is being held in violation of the laws of the United States.

III.

For the reasons stated in this Memorandum Opinion, as well as those expressed from the bench, this Court will grant petitioner/plaintiff's petition for writ of habeas and Complaint for injunctive relief to the following extent: (1) the Court will enjoin defendant from deporting petitioner/plaintiff until the BIA has considered the merits of his Motion to Reopen; and (2) the Court will direct defendant to release Mapoy on bond pending a resolution of his Motion to Reopen. An appropriate order will issue.

The Clerk is directed to forward copies of this Memorandum opinion to counsel of record.

Entered this 26th day of November, 1997.

/s/ Leonie M. Brinkema

United States District Judge